

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITY OF WYOMING,

Plaintiff-Appellee,

v

RONALD P. KRAGT,

Defendant-Appellant.

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UNPUBLISHED

March 9, 2006

No. 255836

Kent Circuit Court

LC No. 04-000309-AV

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order reversing a district court order that dismissed plaintiff's civil infraction citations against defendant. We affirm.

I. Basic Facts and Proceedings

The Kragt Family Limited Partnership owns a parcel of real property located in plaintiff municipality. It leases the property to the Michigan Natural Storage Company (MNSC), of which defendant is president. Beneath the surface of the property are the remains of a gypsum mine that was active until 1943, at which time mining activity ceased. The mining of gypsum created a system of underground "rooms," which have been used since 1943 for commercial purposes, including the storage of refrigerated foods and, more recently, the storage of papers and records.

In 2000, MNSC began to use space in one of the underground "rooms" as an electronic data storage center. Because MNSC did not apply for any building permits, plaintiff did not become aware of the new electronic data center until 2001. Following an investigation, plaintiff issued a stop-work order regarding the electronic data center. MNSC eventually agreed to apply to plaintiff's Construction Board of Appeals (Board) for six variances from the requirements of the Michigan building code. The Board granted five of the six variances but declined a variance from the requirement that an automatic sprinkler system be installed. MNSC appealed to the State Construction Code Commission (Commission), which upheld the Board's decision. When MNSC failed to submit a compliance schedule or to appeal from the Commission's decision,

plaintiff issued three civil infraction citations to defendant for operating the electronic data storage center without a certificate of occupancy.<sup>1</sup>

Defendant moved to dismiss the citations pursuant to MCR 2.116(C)(8) and (C)(10). Defendant argued that the Stille-DeRossett-Hale Single State Construction Code Act (Act), MCL 125.1501 *et seq.*, does not apply to mines, MCL 125.1502a(1)(z), and that, therefore, the building code, which was promulgated pursuant to the Act, did not apply to the underground electronic data storage center.

Following a tour of the premises, the district court granted defendant's motion for summary disposition. Noting that *The American Heritage College Dictionary*, 3rd Ed. (1997), defined "mine" as "[a]n excavation in the earth from which ore or minerals can be extracted," the district court held: "There is no question after touring the excavation in question, that this is a mine as defined by the dictionary. This Court believes that a mine is in fact a mine until it either caves in or exhausts any minable [sic] minerals." The district court further stated that the mine exception in the Act was clear and unambiguous, stating:

A mine is specifically excepted from application of the Code. While it would be tempting, and perhaps even desirous to find that the Code applies to uses rather than the definitions of certain civil construction buildings, it is simply not what the legislature wrote. The Court is sensitive to the Plaintiff's argument that it is the use that should be regulated, it simply does not appear that that is the law as written. The Court also recognizes that this decision leaves open the absurd result that other uses including nightclubs, art museums, or any other use that the imagination could yield, could be conducted in the mine and be exempt from regulation under the Michigan Building Code. However, the Court's role is not to legislate but to enforce the laws as written.

Plaintiff appealed to the circuit court, arguing that the statutory "mine" exception was so vague, as applied to defendant's premises, as to require judicial construction. Plaintiff also took the position, for the first time, that principles of res judicata and collateral estoppel barred defendant's "collateral attack" on the Commissioner's decision denying a variance. Defendant countered that plaintiff had specifically acknowledged at the district court hearing that the statutory construction issue was properly before the court,<sup>2</sup> and, further, that the concepts of res judicata and collateral estoppel did not apply because there was no commonality as to legal issues in the administrative and judicial proceedings.

The circuit court reversed the district court's grant of summary disposition, holding that because defendant did not appeal from the Commission's decision, it was binding pursuant to

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<sup>1</sup> Compliance with the state construction code and other applicable laws is necessary to obtain a certificate of occupancy. MCL 125.1513.

<sup>2</sup> At the district court hearing, plaintiff's counsel stated on the record, in response to questioning by the court, that the statutory construction issue was properly before the court.

MCL 125.1516(1)<sup>3</sup> and was therefore the law of the case. The circuit court opined that plaintiff's concession below that the statutory issue was properly before the district court did not preclude the circuit court from determining otherwise, because an appellate court could address any issue that "justice requires be considered and resolved," *Paschke v Retool Industries (On Reh)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994), so long as the record was adequate to decide the matter. As an "independent" ground for its decision, the circuit court held that the term "mine" as used in the Act could not reasonably include every excavation from which minerals could be extracted:

If an exempted mine really is every excavation from which minerals can be extracted, every basement is exempt from the Code's coverage. Every basement is, by definition, an excavation from which minerals can be removed. Sand is silicon, and other forms of dirt contain other minerals. It might be necessary to punch a hole through a wall or a floor to get to it, but the need to do that does not take the basement out of the dictionary definition used in these cases by the lower court. Given the purpose of the Code, which is to set safety standards for all structures built in this State, except those used for agriculture and those which are works of heavy construction, literal application of the dictionary definition would, by leaving a significant component of most buildings unregulated, significantly dilute the intended protection.

This appeal ensued.

## B. Analysis

The Act establishes procedures for the administration and enforcement of the state construction code, which includes the Michigan building code. See MCL 125.1502a(1)(j); 125.1504(1), (4), (6). MCL 125.1504(1) provides that the state construction code shall consist of "rules governing the construction, use, and occupation of buildings and structures."

MCL 125.1514(1) provides that those subdivisions electing to enforce the state construction code shall create a construction board of appeals, which may, pursuant to MCL 125.1515, grant variances from state construction code provisions. An appeal from the decision of a board of appeals may be appealed to the Commission. MCL 125.1516(1). "Except if modified or reversed by a court of competent jurisdiction, a decision of the commission made under this section is binding on the applicant and the affected board of appeals and enforcing agency." *Id.* MCL 125.1518 provides:

An appeal pursuant to [the Administrative Procedures Act] from a decision of the commission or a board, following an appeal from a decision of a

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<sup>3</sup> MCL 125.1516(1) provides, in relevant part:

Except if modified or reversed by a court of competent jurisdiction, a decision of the commission . . . is binding on the applicant and the affected board of appeals and enforcing agency.

board of appeals or enforcing agency shall be made by a claim of appeal filed with the court of appeals. An appeal pursuant to that Act from any other decision of the commission or of a board shall be by petition to review filed with the Ingham county circuit court.

We hold that the circuit court erred in its *sua sponte* determination that, by virtue of § 125.1516(1), defendant could not challenge the civil infraction citations. At no time in the district court did plaintiff argue either that § 125.1516(1) had any application or that the district court was in any way barred from considering defendant's contention that the Act was inapplicable to MNSC's underground premises. Indeed, plaintiff explicitly conceded on the record that defendant's challenge to the applicability of the Act was properly before the court. Because plaintiff expressly acquiesced to the district court's ability to decide the statutory construction issue, it waived any claim to the contrary. *Hashem v Les Stanford Oldsmobile, Inc.*, 266 Mich App 61, 92 n 11; 697 NW2d 558 (2005); *LME v ARS*, 261 Mich App 273, 277; 680 NW2d 902 (2004). Waiver, unlike mere forfeiture, extinguishes any error, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *Hashem, supra* at 92 n 11, and plaintiff was therefore precluded from claiming in its appeal to the circuit court that the district court improperly decided the statutory construction issue. Moreover, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). Under these circumstances, justice does not require the circuit court address this waived issue.

We further hold that the circuit court reached the correct result in reversing the district court's order that dismissed plaintiff's civil infraction citations against defendant. While the excavation is a mine that is no longer in use, we nonetheless hold that the electronic storage data center within the mine is a structure that is subject to the Act.

Statutory interpretation is a question of law considered de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29, 32; 658 NW2d 139 (2003). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "'The words of a statute provide 'the most reliable evidence of its intent . . . .'" *Id.* quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (internal citation omitted). Clear and unambiguous statutory language must be accorded its plain meaning, and is enforced as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005); When considering an undefined word, it is appropriate to resort to a dictionary to discern the word's meaning. *Breighner v Mich High School Athletic Ass'n, Inc.*, 471 Mich 217, 236; 683 NW2d 639 (2004).

The Act defines "Structure" in relevant part, as

that which is built or constructed, an edifice or building of any kind, or a piece of work artificially built up or composed of parts joined together in some definite manner. Structure . . . does not include works of heavy civil construction including, but not limited to, a highway, bridge, dam, reservoir, lock, *mine*, harbor, dockside port facility, an airport landing facility and facilities for the generation or transmission, or distribution of electricity. . . . [MCL 125.1502a(1)(z) (Emphasis supplied).]

Defendant describes the electronic storage data center as follows:

The electronic data center is created by enclosing space in one of the “rooms” in the Mine. The “enclosure” uses freestanding insulated steel panels and a steel infrastructure for the walls and ceiling. As in the “storage rooms,” the opening to the room is controlled by a three-hour, fire-rated steel door set in a masonry wall. Electric power lines and electronic transmission lines are connected to surface sources. Air circulates through the “room” and the “enclosure” through dampers on both air inlet and air outlet openings in the “room” walls. The dampers are connected electronically to fire and smoke detection equipment such that the dampers close automatically on detection of possible fire. The enclosure is also protected with a gas chemical fire suppression system which is designed for suppressing fire in the area of computer and other electronic equipment. [Defendant’s Brief on Appeal, pp 2-3.]

We conclude that the electronic data storage center is clearly a “structure” under the Act because it is “composed of parts joined together in some definite manner.” MCL 125.150a(1)(z).

Further, we conclude that the electronic data storage center while located in a mine is not itself a “mine.” Despite its lengthy glossary, the construction code does not define “mine.” It is commonly defined as “an excavation made in the earth for the purpose of extracting mineral substances, as ore, coal, or precious stones.” *Random House Webster’s College Dictionary* (2nd ed). The electronic data storage center is not an excavation made in the earth. Rather, the electronic data storage center is a structure that is within an excavation made in the earth. “Statutory exceptions operate to restrict the general applicability of legislative language and are strictly construed.” *Huggett v Dep’t of Natural Resources*, 232 Mich App 188, 194; 590 NW2d 747 (1998), *aff’d* 464 Mich 711; 629 NW2d 915 (2001). Simply put, while the excavation in the earth is a mine that is not subject to the Act, the electronic data storage center constructed within the mine is a structure that is subject to the Act. Therefore, the circuit court properly reversed the district court’s order dismissing plaintiff’s civil infraction citations against defendant.

Affirmed.

/s/ Brian K. Zahra  
/s/ William B. Murphy  
/s/ Janet T. Neff